COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Barbaro v. Australia

Communication No 12/1998

8 August 2000

CERD/C/57/D/12/1998

ADMISSIBILITY

Submitted by: Paul Barbaro

Alleged victim: The author

State party concerned: Australia

Date of communication: 28 November 1998

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 8 August 2000,

Adopts the following:

Decision on admissibility

1. The author of the communication is Paul Barbaro. He claims to have been a victim of racial discrimination by the Australian authorities on the basis of his Italian origin.

The facts as submitted by the author

2.1 On 25 June 1986, the author obtained temporary employment at the Casino in Adelaide, South Australia; he initially worked as a bar porter and subsequently as an attendant. On 16 April 1987, the Liquor Licensing Commissioner (LLC) of the South Australian Liquor Licensing Commission, which is responsible for supervising the observance of the rules governing the management of the Adelaide Casino and must ensure that its operations are subject to continued scrutiny, withdrew the author's temporary employment licence and refused to approve his permanent employment with the Casino. A hearing, during which the LLC questioned the author on a number of points and discussed

his concerns, was held on 30 April 1987.

2.2 In September 1993, well over six years later, the author complained to the Australian Human Rights and Equal Opportunities Commission (HREOC), claiming that the decision of the LLC had been unlawful under sections 9 and 15 of Australia's Race Discrimination Act of 1975. He argued, inter alia, that the LLC had decided against his obtaining a permanent contract because of his and his family's Italian (Calabrian) origin, since some of his relatives were allegedly involved in criminal activities, notably trafficking of illegal drugs, of which he did not know anything. Mr. Barbaro contends that this attitude effectively restricts the possibilities for employment of Italians who are not themselves criminals but who may have relatives that are. In support of his argument, the author refers to letters of support from Peter Duncan, M.P., who seriously questioned and denounced this perceived practice of "guilt by association".

2.3 The author refers to similar cases in which the ethnic background of applicants for employment in licensed casinos was adduced as a reason for not approving employment. In particular, he refers to the case of Carmine Alvaro, decided by the Supreme Court of South Australia in December 1986, who was refused permanent employment because of his family's involvement in the cultivation and sale of illegal drugs. In this case, the LLC had stated that he had been advised by the police that they had received information that one of the drug families in the area would attempt to place a "plant" at the Casino.

2.4 HREOC forwarded the author's complaint to the South Australian Attorney-General's Department for comments. The latter informed HREOC that the "sole reason for refusing [the author's] employment was to ensure the integrity of the Adelaide Casino and public confidence in that institution". Reference was made in this context to a report from the Commissioner of Police, which stated:

> "Paul Barbaro has no convictions in this state. He is a member of a broad family group which, in my opinion, can only be described as a major organized crime group ... Eighteen members of this group have been convicted of major drug offences ... The offences are spread across four states of Australia. All are of Italian extraction. All are related by marriage or direct blood lines."

2.5 There were some discrepancies between the author's and the LLC's assertions in respect of the degree of some of the relationships, in particular the relationships established by the marriages of the author's siblings. The author emphasized that he had maintained a certain autonomy from his relatives and that he did not know personally many of the people listed in the Police Commissioner's report. He also insisted that he knew nothing of his relatives' previous drug-related offences.

2.6 On 30 November 1994, the Racial Discrimination Commissioner of HREOC rejected the author's claims concerning his unlawful dismissal, having determined that it was the author's perceived or actual relationships with individuals who have criminal records, and not his Italian ethnic origin, which was the basis for the LLC's decision. The Race Discrimination Commissioner stated that "[T]he fact that [he] and [his] family members are of Italian origin or descent is not germane" to the resolution of the case.

2.7 On 7 December 1994, the author appealed for review of the Racial Discrimination Commissioner's decision. By decision of 21 March 1995, the President of HREOC confirmed the decision of the Racial Discrimination Commissioner, holding that there was no evidence that the author's ethnic background had been a factor in the LLC's decision.

The complaint

3. Although the author does not invoke any provision of the Convention, it transpires from his communication that he claims a violation by the State party of articles 1, paragraph 1, and 5 (a) and (e) (i) of the Convention.

State party's submission on the admissibility of the communication and author's comments thereon

4.1 By submission of March 1996, the State party challenges the admissibility of the communication on several grounds. It first supplements the facts as presented by the author. Thus, the State party notes that when obtaining temporary employment in 1986, the author gave the Police Commissioner for South Australia written authorization to release to the LLC particulars of all convictions and other information that the Police Department may have had on him. On 25 June 1986, Mr. Barbaro acknowledged in writing that the granting of temporary employment was subject to all enquiries made concerning his application for approval as a Casino employee being concluded to the satisfaction of the LLC, and that temporary approval could be withdrawn at any time.

4.2 On 30 April 1987, the author, accompanied by his lawyer and two character witnesses, attended a hearing before the LLC, during which the LLC explained his concern that the author had an association with an organized crime group. The author was given an opportunity to comment on the evidence which had been provided to the LLC by the Police Commissioner.

4.3 In relation to the author's complaint before HREOC, the State party notes that after the dismissal of Mr. Barbaro's complaint by the Race Discrimination Commissioner, the author gave notice of appeal to have the decision reviewed under section 24AA 9(1) of the Race Discrimination Act (RDA), the President of HREOC, Sir Ronald Wilson, a former High Court judge, confirmed the decision in accordance with section 24AA 2(b)(I) of the RDA, holding that there was no evidence that the author's ethnic origin constituted a ground for the alleged discrimination.

4.4 The State party contends that the case is inadmissible as incompatible with the provisions of the Convention, on the basis of rule 91 (c) of the Committee's rules of procedure, as the Committee is said to lack the competence to deal with the communication. In this context, the State party affirms that Australian law and the RDA conform with the provisions of the Convention. The RDA was enacted by the Federal Government and implements articles 2 and 5 of the Convention by making racial discrimination unlawful and ensuring equality before the law (sects. 9 and 10). The wording of section 9 closely follows the wording of the definition of racial discrimination in article 1 of the Convention. Section 15 of the RDA implements the provisions of article 5 of the Convention in relation to employment. Moreover, HREOC is a national authority established in 1986 for the purpose of receiving and investigating alleged breaches of the RDA. Members of HREOC are statutory appointees and as such enjoy a high degree of independence. HREOC investigated the author's case thoroughly and found no evidence of racial discrimination.

4.5 In the light of the above, the State party argues that it would be inappropriate for the Committee to effectively review the decision of HREOC. While it concedes that the issue of whether the decision of HREOC was arbitrary, amounted to a denial of justice or violated its obligation of impartiality and independence, would fall within the Committee's jurisdiction, it contends that the author did not submit any evidence to this effect. Rather, the evidence contained in the transcript of the hearing before the LLC and the correspondence with HREOC indicate that the author's claim was considered within the terms both of the RDA and the Convention.

4.6 The State party further submits that the complaint is inadmissible on the basis of lack of substantiation, arguing that the author did not provide any evidence that his treatment amounted to a "distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which [had] the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights" (article 1, paragraph 1, of the Convention). There is said to be no evidence that the author's ethnic or national origin was a factor in the decision of the LLC to refuse a permanent appointment to the author; rather, he was concerned to fulfil his duty to ensure that the operations of the casino were subject to constant scrutiny and to guarantee public confidence in the casino's lawful operation and management.

4.7 Finally, the State party claims that the author failed to exhaust available domestic remedies, as required by article 14, paragraph 7 (a), of the Convention, and that he had two available and effective remedies which he should have pursued in relation to his allegation of unfair dismissal. Firstly, it would have been open to the author to challenge the decision of the President of HREOC in the Federal Court of Australia, pursuant to the Administrative Decisions (Judicial Review) Act of 1977 (ADJR Act). The State party emphasizes that the decision of the HREOC President was reviewable under the ADJR Act: grounds for review are listed in section 5 of the Act; they include grounds that there is no evidence or other material to justify the taking of the decision, and that the adoption of the decision was an improper exercise of power. The State party argues that this review mechanism is both available and effective within the meaning of the Committee's admissibility requirements: thus, pursuant to any application under the ADJR Act, the Court may set aside the impugned decision, refer it back to the first instance for further consideration subject to directions, or declare the rights of the parties.

4.8 According to the State party, the author could also have challenged the LLC's decision in the Supreme Court of South Australia, by seeking judicial review under rule 98.01 of the South Australian Supreme Court Rules. Under rule 98.01, the Supreme Court may grant a declaration in the nature of certiorari or mandamus. Under rule 98.09, the Supreme Court may award damages on a summons for judicial review. It is submitted that an action for judicial review pursuant to rule 98 was an available remedy in the instant case.

4.9 The State party concedes that the author was not obliged to exhaust local remedies which are ineffective or objectively have no prospect of success. It refers in this context to the decision of the Full Court of the Supreme Court of South Australia in the case of R. v. Seckler ex parte Alvaro ("Alvaro's case"), decided on 23 December 1986. The material facts of that case were similar to the author's: the respondent was the LLC of South Australia, the same person as in the author's case, and the matter at issue was the respondent's refusal to approve the plaintiff's employment. By majority, the Supreme Court of South Australia held that the plaintiff was not entitled to relief. In the State

party's opinion, the judicial precedent provided by the decision in Alvaro's case did not excuse the author from exhausting the remedy available by way of judicial review; it adds that "unlike an established legal doctrine, a single majority judgement in a relatively new area of law does not meet the test of obvious futility required in order to countenance non-exhaustion of an available remedy".

4.10 Still in the same context, the State party rejects as too broad an interpretation the argument that exhaustion of domestic remedies cannot be required if the remedies available probably would not result in a favorable outcome. Therefore, judicial review under rule 98 of the Supreme Court Rules is said to be both an available and an effective remedy, to which the author did not resort. The State party notes that the author did not file his claim within the six months of the grounds for review first arising (7 November 1987), as is required under rule 98.06 of the Supreme Court Rules. Thus, pursuit of this remedy is now impossible because of the expiration of statutory deadlines; the State party observes that failure to pursue such remedy in a timely manner must be attributed to the author. Reference is made to the jurisprudence of the Human Rights Committee.

5.1 In comments dated 28 April 1996, the author rebuts the State party's arguments and dismisses them as irrelevant to the resolution of his case. He questions the credibility of the State party's arguments in the light of the letters of support he received from a Member of Parliament, Mr. Peter Duncan.

5.2 In the author's opinion, the Committee does have competence to deal with the merits of his claims. He contends that HREOC did not examine his complaint with the requisite procedural fairness. In this context, he notes, without giving further explanations, that the RDA allows complainants to attend a hearing at some designated location to present arguments in support of the complaint, and that this did not occur in his case. The result, he surmises, led to an uninformed decision by HREOC which was not compatible with the provisions of the Convention.

5.3 The author notes that the President of HREOC, Sir Ronald Wilson, who dismissed his claim on 21 March 1995, had been a judge in the Supreme Court of South Australia when the decision in Alvaro's case was handed down in December 1986. He now argues that there was a conflict of interest on the part of the President of HREOC, who had determined the merits of a factually comparable case in the Supreme Court of South Australia before dealing with the author's own case. In the circumstances, the author argues that the HREOC decision was tainted by bias and arbitrariness and that the Committee has competence to deal with his case.

5.4 The author reiterates that there is sufficient evidence to show that his case falls prima facie within the scope of application of article 1, paragraph 1, of the Convention. He argues that "[a]s with normal practices of institutionalized racism a clear and precise reason [for termination of employment] was not given nor required to be given". He further contends that it is difficult to see how the acts of State agents in his case did not amount to a "distinction" within the meaning of the Convention, given the terms of the Police Commissioner's report to the LLC in 1987, in which it was explicitly stated that the author was "a member of a broad family group ... All are of Italian extraction". From this reasoning, the author asserts, it is clear that individuals with his background are precluded from enjoying or exercising their rights on an equal footing with other members of the community. He also refers to a judgement in the case of Mandala and Anor v. Dowell Lee, ((1983) All ER, 1062), in which it was held that blatant and obviously discriminatory statements are

generally not required when investigating instances of race distinctions, since direct evidence of racial bias is often disguised.

5.5 As to the requirement of exhaustion of domestic remedies, the author observes that the decision handed down by the President of HREOC on 21 March 1995 and transmitted to him on 24 March 1995 failed to mention any possible further remedies. He notes that the RDA itself is silent on the possibility of judicial review by the Federal Court of Australia of decisions adopted by the President of HREOC.

5.6 Finally, the author contends that the possibility of judicial review of the decision of the LLC to refuse him permanent employment under the rules of the Supreme Court of South Australia is not realistically open to him. He argues that the judgement of the Supreme Court of South Australia in Alvaro's case constitutes a relevant precedent for the determination of his own case, all the more so since the State party itself acknowledges that Alvaro's case presented many similarities to the author's. If, in addition, the fact that the President of HREOC who dismissed the author's appeal had previously been involved in the determination of Alvaro's case is taken into consideration, the author adds, then the possibility of challenging his decision before the Supreme Court successfully was remote.

6.1 By further submission of 22 July 1996, the State party in turn dismisses as partial or incorrect several of the author's comments. It notes that the author was partial in choosing quotes from the Police Commissioner's report and that the complete quotes indicate that the operative factor in the LLC's decision concerning Mr. Barbaro's suitability for casino employment was his association with 18 members of his family who had been convicted of major drug-related offences. Ethnicity was only raised by the Police Commissioner as one factor, combined with others such as family association and the type of offences; the author's ethnic background was relevant only insofar as it assisted in defining this cluster of associations.

6.2 The State party concedes that in Australian employment practice, associates of applicants for employment are generally not considered a relevant factor in the determination of suitability for employment. In the instant case, it was relevant because the LLC was not an employer but a statutory officer. His statutory role was to ensure the constant scrutiny of casino operations, a role recognized by the Supreme Court of South Australia in Alvaro's case. In short, the LLC was entrusted with maintenance of the internal and external integrity of the casino. Like an employer, however, he was subject to the provisions of the RDA of 1975; in the instant case, the State party reiterates that the fact that there were drug offenders in the author's extended family was a proper justification for the LLC's decision.

6.3 The State party agrees in principle with the author's assertion that obvious and blatant expressions of racial discrimination are not required when investigating instances of race distinctions. It notes in this context that prohibition of indirectly discriminatory acts or unintentionally discriminatory acts is an established principle of Australian law. However, the State party re-emphasizes that decisions in Mr. Barbaro's case rested on grounds other than race, colour, descent or national or ethnic origin.

6.4 The State party contends that the author's comments raise new allegations about the fairness of

the procedures before HREOC, especially as regards his claim that he was denied due process since he was not afforded an opportunity to attend a hearing to present his complaint. The State party argues that the author did not exhaust domestic remedies in this respect and that he could have filed an application for judicial review of this allegation under the ADJR. In any event, the State party continues, procedural fairness did not require the personal attendance of Mr. Barbaro to present his complaint. In the case of HREOC, the grounds for dismissing complaints prior to conciliation are set out in section 24 (2) of the RDA. They are:

(a) If the Race Discrimination Commissioner is satisfied that the discriminatory act is not unlawful by reason of a provision of the RDA;

(b) If the Commissioner is of the opinion that the aggrieved person does not desire that the inquiry be made or continued;

(c) If the complaint has been made to the Commission in relation to an act which occurred more than 12 months prior to the filing of the claim;

(d) If the Commissioner is of the opinion that the complaint under consideration is frivolous, vexatious, misconceived or lacking in substance.

In the author's case, the President of HREOC dismissed the complaint on the basis of section 24 (2) (d) of the RDA.

6.5 The State party dismisses as totally unfounded the author's argument that the HREOC decision was biased because of an alleged conflict of interest on the part of the President of HREOC. The State party points to the long-standing involvement of the President of HREOC in the legal profession and adds that it is indeed likely that someone with his profile and background will consider at different times issues which are related in law or in fact. The State party emphasizes that a previous encounter with a similar (factual or legal) issue does not result in a conflict of interest. Further evidence of bias is required, which the author has patently failed to provide.

6.6 As to Mr. Barbaro's contention that he was not informed of the availability of domestic remedies after the HREOC decision of 21 March 1995, the State party notes that neither the Convention nor the Australian RDA of 1975 impose an obligation to indicate all available appellate mechanisms to a complainant.

6.7 Finally, concerning the letters of support sent to HREOC on the author's behalf by a Member of Parliament, Mr. Peter Duncan, formerly a parliamentary secretary to the Attorney-General, the State party recalls that Federal Parliamentarians frequently write to HREOC on behalf of their constituents, advocating the rights of their constituents in their role as democratically elected representatives. The State party contends that this role must be distinguished from both the investigative role of the independent HREOC and the executive role of the parliamentary secretary to the Attorney-General. In the instant case, it was clear that the M. P. acted on the author's behalf in his representative role. More importantly, the purpose of the letters was to urge a thorough investigation of the author's complaints by HREOC. Once a final decision in the case had been taken, Mr. Duncan did not write again.

7. During its forty-ninth session, in August 1996, the Committee considered the communication but concluded that further information from the State party was required before an informed decision on admissibility could be adopted. Accordingly, the State party was requested to clarify:

(a) Whether the author would have had the opportunity, in the event that complaints under the Administrative Decisions (Judicial Review) Act and pursuant to rule 98.01 of the Rules of the Supreme Court of South Australia had been dismissed, to appeal further to the Federal Court of Australia, or whether he could have complained directly to the Federal Court of Australia;

(b) Whether the State party consistently does, or does not, inform individuals in the author's situation of the availability of judicial remedies in their cases.

8.1 In reply, the State party notes that Mr. Barbaro would have had the opportunity to appeal to the Federal Court of Australia and subsequently the High Court of Australia in the event that a complaint under the ADJR Act had been dismissed. Under section 8, the Federal Court of Australia has jurisdiction to hear applications under the ADJR Act; applications may be filed in respect of decisions to which the Act applies, and decisions of the President of the HREOC fall within the definition of "decision(s) to which this Act applies" (sect. 3 (1)). The author thus had the right to seek judicial review of the President's decision before a single judge of the Federal Court of Australia on any of the grounds listed in section 5 of the ADJR Act relevant to his case, within 28 days of the decision of the HREOC President. If an application before a single Federal Court judge had been unsuccessful, the author would have had the right to seek leave to appeal to the full Federal Court.

8.2 If unsuccessful in the full Federal Court of Australia application, the author would have been further entitled to seek special leave to appeal to the High Court of Australia under Order 69A of the High Court Rules; criteria for granting special leave to appeal are listed in section 35A of the federal Judiciary Act 1903. If special leave to appeal were granted, a three-week period from the granting of special leave to appeal would apply for the filing of the notice of appeal.

8.3 The State party further notes that the author would have had an opportunity to appeal to the full court of the Supreme Court of South Australia and thereafter the High Court of Australia if a complaint under rule 98.01 of the Rules of the Supreme Court of South Australia had been dismissed by a single judge (section 50 of the Supreme Court Act, 1935 (South Australia)). Mr. Barbaro would have had to lodge an appeal within 14 days of the single judge's decision. If an appeal to the full court of South Australia had been unsuccessful, Mr. Barbaro could have sought special leave from the High Court of Australia to appeal against the decision of the full court of the Supreme Court of South Australia pursuant to section 35 of the Federal Judiciary Act, 1903.

8.4 The State party reiterates that the Convention does not impose an obligation to indicate all available appeal mechanisms to a complainant. There is no statutory obligation to provide individuals with information about possible judicial remedies under federal or South Australian law; nor is it the practice of the federal Government or the Government of South Australia to advise individuals about possible appeal rights. There are, however, some obligations to inform individuals of their appeal rights: thus, under the federal Race Discrimination Act, 1975, where the Race Discrimination Commissioner decides not to enquire into an action in respect of which a complaint

was filed, he or she must inform the complainant of the ratio decidendi for that decision and of the complainant's rights to have this decision reviewed by the HREOC President (sect. 24 (3)). In Mr. Barbaro's case, this obligation was met. It is, moreover, the practice of HREOC to advise verbally any complainant who has manifested a desire to challenge a decision of the Commission's president of other avenues of appeal. There is no evidence that HREOC deviated from this practice in the author's case.

8.5 The State party notes that Mr. Barbaro does not appear to have sought legal advice on appeals and remedies available to him; it adds that it is common knowledge that a system of publicly funded legal aid exists in Australia, as well as a national network of community legal centres, including in South Australia. Both legal aid and community legal centres would have provided free legal advice about possible appeal mechanisms to individuals in the author's situation. Mr. Barbaro's failure to avail himself of such free legal advice cannot be attributed to the State party; reference is made to the Committee's jurisprudence that it is the author's own responsibility to exhaust domestic remedies. 1/

9.1 In his comments, the author concedes that the Race Discrimination Commissioner informed him of his right of review of her decision under section 24AA (1) of the Race Discrimination Act. He submits, however, that the President of HREOC did not inform him of the possibilities of any avenues of appeal against his decision, communicated to the author on 24 March 1995; he contends that the HREOC President, a former High Court judge, should have informed him of possible remedies. Mr. Barbaro adds that, as a layman, he could not have been aware of any other possible judicial remedies against the decision of the HREOC President.

9.2 The author reaffirms that an application to the Supreme Court of South Australia under rule 98.01 of the Court's rules would have been futile, given the Supreme Court's earlier judgement in the Alvaro case.

9.3 Finally, with regard to the State party's reference to the availability of legal advice from community legal centres, Mr. Barbaro submits that "such assistance is only available in extreme situations and ... only if the matter involves an indictable offence".

Committee's decision on admissibility of 14 August 1997

10.1 Before considering any claims contained in a communication, the Committee on the Elimination of Racial Discrimination must decide, pursuant to article 14, paragraph 7 (a), of the Convention, whether or not the case is admissible.

10.2 The Committee considered the question of admissibility of the present communication at its fifty-first session, in August 1997. It noted the State party's argument that the author's claims were inadmissible on the basis of failure to substantiate the racially discriminatory nature of the decision taken by the LLC in May 1987. It found, however, that the author had made specific allegations, notably insofar as they related to passages in the report of the Police Commissioner of South Australia which had been made available to the LLC, to support his contention that his national and/or ethnic background influenced the decision of the LLC. It therefore concluded that the author had sufficiently substantiated, for purposes of admissibility, his claims under article 5 (a) and (e) (i),

read together with article 1, paragraph 1, of the Convention.

10.3 The Committee also noted the State party's claim that the author had failed to exhaust domestic remedies which were both available and effective, since he could have challenged the decision of the President of HREOC under the Administrative Decisions (Judicial Review) Act, and the decision of the LLC pursuant to rule 98.01 of the rules of the Supreme Court of South Australia. To such claims the author had replied that he had not been informed of the availability of those remedies, and that the precedent established by the judgement in Alvaro's case would have made an appeal to the Supreme Court of South Australia futile.

10.4 The Committee considered that it would have been incumbent upon the author's legal representative to inform him of possible avenues of appeal. The fact that he was not informed of potential judicial remedies by the judicial authorities of South Australia did not absolve him from seeking to pursue avenues of judicial redress; nor could the impossibility to do so at the time of the Committee's decision, after expiration of statutory deadlines for the filing of appeals, be attributed to the State party. The Committee further considered that the judgement of the Supreme Court of South Australia in Alvaro's case was not necessarily dispositive of the author's own case. Firstly, the judgement in Alvaro's case was a majority and not a unanimous judgement. Secondly, the judgement was delivered in respect of legal issues which were, as the State party pointed out, largely uncharted. In the circumstances, the existence of one judgement, albeit on issues similar to those in the author's case, did not absolve Mr. Barbaro from attempting to avail himself of the remedy under rule 98.01 of the Supreme Court rules. Finally, even if that recourse had failed, it would have been open to the author to appeal to Federal Court instances.

11. In the circumstances, the Committee concluded that the author had failed to meet the requirements of article 14, paragraph 7 (a), of the Convention and decided that the communication was inadmissible. 2/

New submission from the author

12.1 In a submission dated 28 November 1998 the author informs the Committee that following its findings of August 1997, he began proceedings in the Federal Court challenging the decision dated 21 March 1995 of the President of HREOC. He states that the recourse to the Federal Court was the only mechanism available. The Supreme Court could not be used for two reasons: the precedent established by Alvaro's case and its lack of jurisdiction to hear complaints of racial discrimination.

12.2 Justice O'Loughlin of the Federal Court heard the complaint on 14 May 1998 and delivered his decision on 29 May 1998. Justice O'Loughlin found that although he would have excused the delay in its submission the complaint had no reasonable prospects of success, inter alia, because racial discrimination could not be proved regardless of all the material at his disposal. On 19 June 1998 this decision was confirmed on appeal by the full Federal Court.

12.3 The author submits that his next legal move would be to challenge the full Court's decision. To do that he has first to be granted special leave to appeal to the High Court. However, for a matter to be heard by the High Court stringent tests must be met. For instance, it has to be established that there was an error of law. In cases of errors of fact, which this case apparently falls under, special

leave to appeal will not be granted. In view of the fact that four Federal Court justices reached the same conclusion it would be futile to proceed any further. In its submission to the Committee the State party itself has conceded that one is not obliged to exhaust local remedies which are ineffective or objectively have no prospect of success.

Observations of the State party

13.1 In a submission dated August 1999 the State party challenges the author's claims to have exhausted domestic remedies. The State party maintains its submission that if the author were unsuccessful in his appeal to the full Federal Court he had the further right to seek special leave to appeal to the High Court under order 69A of the High Court rules. Special leave to appeal to the High Court is both an available and effective remedy within the meaning of article 14, paragraph 7 (a) and the general principles of international law. There was and is now no formal bar to the author pursuing this avenue. Although the author is out of time for instituting his application, it is also possible to seek an extension of time for special leave to appeal.

13.2 The State party contends that an individual is not absolved from pursuing all domestic remedies to finality on the grounds that he has been unsuccessful in previous appeals and predicts that he may be unsuccessful before a higher court unless there is recent, relevant and conclusive precedent on the issue. It recalls that in its decision in D.S. v. Sweden, communication No. 9/1997, the author contended before the Committee that there was no real possibility of obtaining redress through the Ombudsman or in a district court because of her lack of success on previous occasions. However, the Committee concluded that "notwithstanding the reservations that the author might have ... it was incumbent upon her to pursue the remedies available, including a complaint before a district court. Mere doubts about the effectiveness of such remedies or the belief that the resort to them may incur costs, do not absolve a complainant from pursuing them".

13.3 With respect to the author's claim that an action for judicial review of the decision of the LLC is not an available remedy, the State party refers the Committee to its previous admissibility decision in which the Committee held that the author had failed to exhaust domestic remedies on the grounds that he did not pursue review of the decision of the LLC pursuant to rule 98.01 of the rules of the Supreme Court of South Australia. 3/ The State party contends that on this point the author seeks to challenge the Committee's decision and reopen the issue by arguing new grounds to support his claim to be absolved from pursuing judicial review in the Supreme Court.

13.4 The State party submits that repetitive submissions on a point already decided upon by the Committee may amount to an abuse of the right of petition under rule 91 (d) of the Committee's rules of procedure. Alternatively, the State party contests the author's claim and maintains its submission that he could have sued the LLC in the Supreme Court and has therefore failed to exhaust domestic remedies. An action for common law judicial review could have been brought in the Supreme Court of South Australia in two ways. First, the author could have sought a remedy under rule 98 of the Supreme Court's rules to have the Commissioner's decision quashed for legal error (certiorari), or declared void. Second, as an alternative, a declaration of invalidity could have been sought by the author outside rule 98. The possibility of a rule 98 application remains open even now, although leave of the Court is required. The alternative action of a declaration outside rule 98 could be pursued even now and does not require leave. Had the author been unsuccessful in judicial review

proceedings pursuant to rule 98, he would have been entitled to appeal to the full court of the Supreme Court within 14 days. Furthermore, the author could have sought special leave from the High Court of Australia to appeal against the decision of the full court.

13.5 As to the author's assertion that the Supreme Court does not have jurisdiction to deal with issues of racial discrimination, the State party maintains that the LLC cannot lawfully exercise his discretion to refuse to approve employment on racial grounds. The court would either quash such a decision or declare it void. Therefore, judicial review of the decision of the LLC constitutes an effective remedy within the meaning of article 14, paragraph 7 (a). As for the precedent of Alvaro's case, the State party states that the court in that case did not decide that the Commissioner was immune to judicial review if he acts on racially discriminatory grounds when deciding not to grant approval of employment. The complainant had claimed that he was not given a fair hearing before approval was refused and the court merely held that a hearing did not have to be accorded to a person before the LLC refused approval. Racial discrimination was not alleged in that case. Furthermore, the court in Alvaro's case indicated that the LLC would be in breach of his duty if he refused approval for employment for improper considerations.

13.6 In addition to its argument regarding lack of exhaustion of domestic remedies the State party submits that the communication should be declared inadmissible on the ground that it is incompatible with the provisions of the Convention under rule 91 (c) of the Committee's rules of procedure. This submission is made on the grounds that the author is in fact requesting the Committee to review the HREOC decision that the evidence did not disclose racial discrimination, which would amount to review of the lawful exercise of the HREOC discretion not to investigate the claim. The State party understands the Committee may determine whether the laws or actions raise issues concerning, or interfere with, rights protected under the Convention. However, the Committee should be reluctant to go against the decision of an independent national body competent to deal with claims of racial discrimination when that body has assessed the evidence and made its determination according to domestic law which is directed to the implementation of the Convention. In this respect the State party quotes decisions of the Human Rights Committee in which the latter has stated inter alia that it is not within its powers or functions to evaluate the evidence in a case unless it can be ascertained that the court's decision was arbitrary or amounted to a denial of justice or that the judge otherwise violated his obligation of independence and impartiality. If the author had alleged that the HREOC decision was tainted by arbitrariness or amounted to a denial of justice, or violated its obligation of independence an impartiality, such a matter would fall within the jurisdiction of the Committee. However, the author has made no such allegation and submitted no evidence to that effect.

Author's comments

14.1 In comments dated 25 October 1999 the author rebuts the State party's arguments. Regarding the special leave to appeal the full Federal Court's decision the author cites a decision (Morris v. R, 1987) which, in his opinion, supports his claim regarding the court's reluctance to grant special leave in a case like his. The court said, for instance, that "since the number of cases with which the court can properly deal in any one year is limited, it is inevitable that a careful choice must be made having regard to the duty, which the court has, to develop and clarify the law and to maintain procedural regularity in the courts below. The court must necessarily place greater emphasis upon

its public role in the evolution of the law than upon the private rights of the litigants before it". Furthermore, in the Alvaro case the High Court refused to grant the applicant special leave to appeal. According to the author, the State party's submission regarding High Court availability, effectiveness and prospect of success is without foundation in the light of this precedent. The author also claims that during the previous proceedings at the High Court the State of South Australia requested that his case be summarily dismissed on the basis that he was unable to provide costs security. As any further court action would only exacerbate the costs situation there is no doubt that the State of South Australia would once again use this tactic.

14.2 With regard to the possibility of filing an application with the Supreme Court of South Australia the author persists with the arguments already put forward. He reiterates, in particular, that the Supreme Court is not the jurisdiction to remedy the racial discrimination to which he was subjected, in view of the fact that it has no authority to determine cases where breaches of Commonwealth racial discrimination law is alleged, either within or outside rule 98. The lack of jurisdiction is linked, in particular, to the fact that the LLC act was a case of "indirect discrimination". Indirect discrimination occurs when a rule, practice or policy which appears to be neutral has a disproportionate impact on the group of which the complainant is a member. The State party falls into error when it relies on the assumption that had the LLC acted dishonestly or with bias or capriciousness the Supreme Court would be an effective avenue of redress.

Issues and proceedings before the Committee

15.1 At its fifty-seventh session, in August 2000, the Committee considered again the question of admissibility of the communication in the light of the new information provided by the parties and in accordance with rule 93, paragraph 2 of the Committee's rules of procedure. Under that provision a decision taken by the Committee, in conformity with article 14, paragraph 7 (a), that a communication is inadmissible, may be reviewed at a later date upon written request by the petitioner concerned. Such written request shall contain documentary evidence to the effect that the reasons for inadmissibility referred to in article 14, paragraph 7 (a), are no longer applicable.

15.2 The Committee notes that the author appealed to the Federal Court but not to the High Court. In view of all the information at its disposal, the Committee considers that notwithstanding the reservations that the author might have regarding the effectiveness of such an appeal, it was incumbent upon him to pursue all remedies available.

15.3 In the light of the above, the Committee considers that the author has failed to meet the requirements of article 14, paragraph 7 (a), of the Convention.

16. The Committee on the Elimination of Racial Discrimination therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and the author of the communication.

Notes

1/ See decision on communication No. 5/1994 (C.P. and his son v. Denmark) in Official Records of the General Assembly, Fiftieth Session, Supplement No. 18 (A/50/18), annex VIII, para 6.2.

2/ CERD/C/51/D/7/1995.

3/ Paragraph 10.4 above.